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No. _____

IN THE

Supreme Court of the United States

October Term, 1983

JOHN BURCHE,
a/k/a IOAN BURCHE,
Petitioner,

v.

JOHN S. WALTERS
and VIRGINIA L. WALTERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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QUESTION PRESENTED

Is this a flagrant judicial error when in two identical cases: Walters v. Burche considered by Judge J. H. Darbyshire, and DePardo v. Burche considered by Judge G. Goebel, Scott County, Iowa, trial court did elaborate two opposite decisions? (See Appendices D_1 and E_1!)

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PETITION FOR A WRIT OF CERTIORARI
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OF THE STATE OF IOWA

The Petitioner, John Burche, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered on February 24, 1984.

OPINION BELOW

The opinion of the Supreme Court of Iowa appears in the Appendix A. The opinion of the Court of Appeals of Iowa and judgment

of District Court of Iowa for Scott County appear also in the Appendices B, C and D.

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on February 24, 1984. See Appendix A. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court jurisdiction is invoked under 28 U.S.C.A. 1254(27), (65), (66), (73), (192), (206) and 28 U.S.C.A. 2680 (14), (57).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article III, Section 2:

> "The judicial power of the federal courts shall extend to all cases, Law and Equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

Constitution of the United States, Article VI, Clause 2:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land."

Constitution of the United States, Seventh

"In cases of common law (civil law), when the value of the object under dispute is more than twenty dollars, the parties in the dispute may ask for a jury trial."

Constitution of the United States, Fourteenth Amendment, Section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without the process of law."

STATEMENT OF THE FACTS

At the end of 1975, Defendant bought half an acre house lot at 1802-04 W. 49th Street, Davenport, Iowa, in an area condemned to flooding, with the purpose to improve it and build a duplex. East of Defendant's lot were already old houses placed on graded lots having different topographic configurations. The Defendant on December 13, 1976, did request and received a building permit from the City of Davenport, Iowa,

anc started to build a duplex on graded property. In June, 1977, the Defendant did get an occupancy permit after the premises were inspected three times by the City of Davenport during the period of building and improvements of property. In order to bring the topographic configuration of Lot 32W in line with DePardo's property, located east of Defendant's property, it was necessary to level such hilly property by cutting the top of the hill which rose almost straight up about 25 feet above the level of W. 49th Street. The dirt resulting from such grading was pushed toward the north of the lot, to level existing slope.

On the north side of Defendant's lot, at 35 foot distance, there were two shallow paths of a creek running from northwest to southeast on Defendant's property. The Defendant, through grading, filled up the first path of the creek and enlarged and deepened the second path of the creek,

allowing water during rainfalls a free flow through a ditch without changing the natural water flow from northwest to southeast. DePardo and other neighbors did not make any complaint before or after the upgrading of Defendant's property, because a part of the swamp existent in such area has been eliminated. The same approach could have been used by neighbors from west and east of Defendant's property, owners of Lots 25 and 32E, to avoid flooding of their properties. The City of Davenport analyzed different possibilities in the past at the request of property-owners in that area, did recommend a storm sewer ditch system, and estimated the cost for each owner. Unfortunately, the owners of properties in such area did not want to pay a part of costs and preferred to maintain a swamp on their properties. The Plaintiffs' complaint filed on October 25, 1979, alleged that the Defendant's ditch did help the creation of water

accumulation north of Defendant's property, and during a heavy rainfall on August 20, 1979, large waves of water passed through relocated ditch toward southeast and struck the Plaintiffs' house, damaging the basement. Such assumption, in Defendant's opinion, is technically impossible for the following reasons:

a. The Defendant's ditch was large enough and sloped from northwest to southeast to accommodate any water flow;

b. The distance between Defendant's ditch and Plaintiffs' house was about 180 feet and such house was located at 6 to 8 foot higher elevation than Defendant's ditch, separated by an open field, DePardo's lot, sloped from north to south and east to west;

c. Water flow always followed the normal path northwest to southeast because the slope of area dictated such flow;

d. Flooding of area was always de-

termined by the undersized culverts located at W. 49th Street restricting the water flow which backed up toward north and northeast;

e. Pictures taken during another flood, on May 17, 1980, when the position of ditch on Defendant's property was the same as during flooding on August 20, 1979, did show that Plaintiffs' house was far away of being flooded. The Plaintiffs did not present adequate evidence to demonstrate that their house has been damaged by flood because the opinion of technical experts is that infiltrated water generating a hydrostatic pressure against walls is responsible for such damage;

f. A picture presented by Plaintiffs showing their house after flood on August 20, 1979, did not indicate that their house has been flooded (no mud or debris around the house or over the grass);

g. During any flood in that area, W.

49th Street was flooded first and then surrounding area, then it was not probable that water passing through Defendant's ditch did run in a straight path to Plaintiffs' house;

h. The Plaintiffs did build an unsafe house in an area condemned to flooding, because other houses in that area did not present any structural damage.

Later on, in July, 1980, the City of Davenport, in the abusive way and without Defendant's knowledge, did relocate the position of ditch about 35 feet south. The Defendant believes that a vendetta-type of harassment initiated by R. Matthews from the City of Davenport, together with Plaintiffs and Shirley DePardo, residing east of Defendant's property, did raise false accusations to get financial benefits in order to remodel their houses. Such type of vendetta has been encouraged by R. Matthews, who was demoted for a period of time by the City of Davenport. The Defendant filed a

suit on August 20, 1980, to Scott County Court against the City of Davenport and the Court ruled against the City of Davenport. (See Appendix F)

S. DePardo, the neighbor on the east side filed a small claim to Scott County Court against Defendant because her house has been also flooded on August 20, 1979, and the Court denied her claim. (See Appendix E)

The Plaintiffs' case was tried in the Scott County District Court of Iowa without a jury on May 13, 1982. Judge J. Hobart Darbyshire filed a Findings of Fact, Conclusions of Law and Judgment Entry on August 16, 1982, (see Appendix D) wherein he found in favor of the Plaintiffs in the sum of $14,326.00 plus interest and court costs, without taking in consideration a ruling of the same Court for a similar case filed by the closest neighbor, S. DePardo, against Defendant.

During trial, the Defendant brought as a witness A. Liska, an expert from a professional corporation in water drainage, who testified that Plaintiffs' allegations were not possible from a technical viewpoint. It is a flagrant contradiction between trial court judgment and the Defendant's expert opinion.

On September 15, 1982, the Defendant did file a Motion for New Trial, presenting two more experts' opinions besides the two presented during trial on May 13, 1982. These two additional experts' opinions were also in contradiction with the trial court's judgment.

The trial had not been completed on May 13, 1983, and the Defendant requested additional witnesses, including Pat P. McGrath, acting director of engineering at Davenport City, Wilfred Hammes, and the acceptance of City of Davenport's written opinion, which was refused during trial. Judge J. Hobart

Darbyshire denied the Motion for New Trial filed on October 20, 1982. (See Appendix C)

The Defendant appealed the case in the Court of Appeals of Iowa and Judges P. J. Snell, Schlegel, and J. J. Hayden did affirm the lower court judgment on December 27, 1983. (See Appendix B)

Furthermore, the Defendant filed, on January 10, 1984, an Application for Further Review to the Supreme Court of Iowa, and the Chief Justice overruled and denied the Defendant's Application. (See Appendix A)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Defendant terminated his legal representative prior to trial due to severe differences in opinions concerning Defendant's legal representation and proceeded to trial on a pro se basis. The Court ruled that the counterclaim was untimely and denied the counterclaim.

The Iowa law concerning amendment of a

pleading appears to be that the trial court has broad discretion in ruling upon amendments and that decisions of the trial court on amendments will be reversed only if it appears that that discretion has been abused. It further appears that the general rule is that amendments will be allowed and that the denial of permission to amend will be the exception. However, untimely amendments which allege new grounds or substantially change the issues of the lawsuit are viewed less favorably and are commonly denied. Ackerman v Lauver, 242 N.W.2d 342, 345 (Iowa 1976).

The counterclaim of the Defendant, filed on April 27, 1982, basically demands damages on the ground that the Plaintiffs' litigation amounts to harassment. The Defendant alleged that the litigation of the Plaintiffs was for no reason other than to cause problems for the Defendant and to interfere with his property rights.

Unfortunately, the Plaintiffs' attorney did not make any attempt to clarify the case and advise his clients in getting a technical opinion from a consultant specialized in water drainage as Defendant suggested him through a letter dated on September 12, 1979. He forgot the moral mission of lawyers: "Lawyers should be healers, not hired guns." (Chief Justice Warren Burger's speech at the conference of American Bar Association, 1984) In other words, legal technicalities were considered more important than right or wrong in his opinion.

Although the Plaintiffs, in their written resistance to the counterclaim, and during trial, did state that allowing the counterclaim would amount to a continuance of the trial, there is no actual request for a continuance nor did the Plaintiffs, when they were allowed to address the issue at the time set for trial, mention or in

any way suggest that they would need further time to prepare to meet the allegations of the counterclaim.

Under these circumstances, and particularly where the Defendant is appearing pro se, the amendment should have been allowed. The trial court's failure to allow the counterclaim amounts to an abuse of discretion, contradicting legal rights of Defendant. (U.S.C.A. 28, 2860(14).)

At the time this lawsuit was filed, the Plaintiffs filed with their Petition a written demand for jury trial. That jury demand was filed October 25, 1979. The jury request was later changed, during a period when the Defendant was represented by counsel, without Defendant's knowledge, being one of the reasons for dismissal of Defendant's attorney. The Plaintiffs' main objection to the Defendant's request for a jury trial seems to be that the case had been set for trial and that if a jury trial

were granted that the matter would have to be rescheduled. The demand has been denied and the case proceeded to trial before the Court.

The Iowa Rule concerning an untimely filed demand for a jury trial appears to be that the District Court has wide discretion in granting or denying such an untimely demand. The District Court's ruling will only be reversed on appeal if it appears that the District Court has abused its discretion. Federal Deposit Insurance Corporation v National Surety Corporation, 281 N.W.2d 816 (Iowa 1979); Egan v Egan, 212 N.W.2d 461 (Iowa 1973); Schupbach v Schukneckt, 204 N.W.2d 918 (Iowa 1973).

The Supreme Court of the United States granted certiorari to review decision of Court of Appeals that in diversity action in Federal District Court, State law governs in determining whether action is "legal" or "equitable" for purpose of deciding whether

claimant has right to jury trial. Simler v Conner, Oke., 1963, 83 S.Ct. 609, 372 U.S. 221, 9 L.Ed.2d 691.

When there is no evidence of prejudice to the Plaintiffs and where, as in this case, thre is not even an allegation of prejudice to the Plaintiffs, the better practice would be to grant the Defendant's request for a trial to a jury. Under these circumstances, the trial court abused its discretion by denying the Defendant's request for a jury trial, contradicting legal rights of Defendant. (U.S.C.A. 28, 2860 (14).) The Supreme Court of Iowa, by affirming the lower court decision, continued to deprive the Defendant of his legal rights.

In this Petition, the Defendant-Appellant is alleging that there was insufficient evidence presented by Plaintiffs to support a finding of liability on the part of the Defendant.

During the trial, from the testimonies

of Plaintiffs' and Defendant's witnesses, there were concluded the following points: The Plaintiffs and the Defendant owned lots at a distance of 180 feet on the same city block in Davenport, Iowa. Their lots were separated by two other lots. The Defendant did some landscaping work on his lot. As a result of that landscaping, water which flowed during rainy days through the Defendant's ditch onto his next neighbor's property, S. DePardo, and then down into a culvert at street level, was rechanneled. There was an estimate that the water flow over the areas in question was draining approximately 130 acres.

Rex Matthews, a City of Davenport employee, did not testify as the City's representative, but on his own, at the request of Plaintiffs. He stated that the Defendant's ditch did block the natural water drainage, backing it up. He also agreed with Major Engineering report stating that

undersized culverts placed at W. 49th Street do restrict the water flow helping flooding of area in discussion. Two statements made by R. Matthews contradicting each other did create a total confusion in assessing the real facts. He also stated that relocation of ditch on Defendant's property by the City of Davenport at his suggestion was the subject of several letters between him and Defendant.

Ivan Hayes stated that Defendant did move the ditch further north and he also recognized the relocation of ditch to south by the City of Davenport crew did reduce the distance between Plaintiffs' house and new ditch. McCallister stated at trial that he saw at 1:30 a.m. on August 20, during flooding, water running from Defendant's ditch toward Plaintiffs' house. Such statement has been questioned by the technical expert, A. Liska. He also testified that before landscaping and ditch excavation by the De-

fendant, he did not see at first flooding on the back yard because water went to the street first and then was backed up to the back yard.

The Plaintiff himself testified that he felt, as McCallister, that the damage to his house was done as a result of the water that had been rechanneled. At the same time, all houses in that area were flooded, even those houses located across W. 49th Street. Houses located across W. 49th Street had water in their basements two or three times before 1979 and they did not suffer damages because they were better built, in Defendant's opinion. Plaintiffs did not give any opinion about relationship between Defendant's ditch and flooded houses located across W. 49th Street about 250 feet south of ditch.

Against this testimony, the Defendant put forward uncontested evidence as follows:

The Plaintiff's wife did present some of bills with expenses connected with repairing

of their house, including also a TV-stereo for $800; steps, clothing, freezer, floor, CB radio ($800), food in the freezer ($300). Such expenses were attributed also to flood, just to harass the Defendant and take financial advantages.

W. Hammes, previous owner of Defendant's lot and who lives now about five blocks northwest of the Plaintiffs' property, facing the same creek, did state that the area in question had been subject to flooding several times prior to landscaping work done by the Defendant. His house located about 1200 feet northwest of Defendant's property has been flooded also on August 20, 1979 and May 17, 1980. His front yard was completely flooded on several occasions, but without damaging the house.

M. McCallister, as Plaintiffs' witness, stated that his father-in-law, while he was living in the same house with him, had repeatedly complained to the City of Davenport

concerning the flooding in that area. He also admitted complaining to the City about flooding in that area. The City did suggest a drainage system but it was rejected by property owners due to high cost.

The Plaintiff was questioned as to the possibility of whether his basement had been damaged because of lack of steel reinforcement and proper drainage of infiltrated water. The Plaintiff was unable to give an opinion on this question. He also did not give an answer to the question that the picture of his damaged basement did not show any mud and debris on the grass around his house.

The Plaintiff also admitted that he had not asked for technical advice from any professional corporation concerning the actual specific cause of the damage at his basement wall. The Plaintiff further admitted that many times the water in that area had previously gone over the top of their street.

During heavy rains W. 49th Street was flooded first, then water backed up south and north.

Andrew Liska, a civil engineer, expert in drainage, was called as an expert witness by the Defendant.

Plaintiffs, Defendant, their witnesses and technical experts did admit the following facts:

a. That before 1979 and before Defendant graded his lot the area has been flooded.

b. That during any flood the street was flooded first and then water backed up.

c. That culverts existent at W. 49th Street are undersized now and were undersized during any flood.

d. That property owners in Green Acres area did complain to the City of Davenport about undersizing of culverts at W. 49th Street. The City of Davenport did suggest a ditch drainage system but it was

rejected by property owners as being too expensive.

e. That during flooding the direction of water flow was from northwest to southeast.

f. That Plaintiffs' lot has a slight depression in the southwest corner which is still there.

g. That Defendant before starting any work on his property did talk to the neighbor DePardo and got a building permit for a duplex and occupancy permit.

h. That since 1977 when Defendant graded his property and made a ditch, until October 25, 1979, there were no verbal or written complaints.

i. Plaintiffs and their witnesses did testify that Plaintiffs' house and yard has been flooded, leaving a lot of debris, but the picture presented by Plaintiffs did not show any debris. Both Plaintiffs asked to comment about the absence of debris on

their picture did not have an answer other than "I don't know".

Experts' testimonies taken during trial and official documents presented during trial did show the following:

a. That the ditch made by Defendant as part of landscaping was adequate and did not influence flooding of Green Acres where the Plaintiffs' house was located.

b. That it was impossible for water from Defendant's ditch placed at any location to go to Plaintiffs' house at any velocity because it was located at a higher elevation.

c. That the damaged basement of Plaintiffs' house has been determined by hydrostatic pressure generated by the infiltrated water, quality of foundation and not by flood. Other houses flooded at a higher extent did not suffer structural damages.

d. Relocation of ditch on Defendant's property by the City of Davenport did not

reduce the danger of flooding until a proper water drainage at W. 49th Street is assured.

e. The accumulation of water west of Defendant's ditch, restricting its flow, did delay flooding of W. 49th Street and surrounding area, including Plaintiffs' house.

f. The experts did demonstrate to the Court their adequate knowledge about hydraulics, a science directly related to flood.

g. That flooding at W. 49th Street at Green Acres is determined during heavy rainfalls by four main factors: water stream flow coming from northwest to southeast, water stream flow coming from west to east, sizing of culverts at W. 49th Street, and sizing of culverts at W. 49th and Division intersection.

During trial and immediately after trial, Judge J. Hobart Darbyshire did abuse his discretion and power by refusing Defendant

to present as Exhibits very important documents related to the case and subpoena an official from the City of Davenport.

At the request of Defendant for a Motion for New Trial to present additional evidence presented by two technical experts, Judge J. Hobart Darbyshire did continue to exercise his abuse of discretion and power by denying it. Judge Darbyshire, during trial and after trial, did infringe the constitutional rights of Defendant by not conducting a fair trial (U.S.C.A. 28, 1254(66); by not admitting some of substantial evidences presented by Defendant (U.S.C.A. 28, 1254(206); did exercise an abuse of power and discretion (U.S.C.A. 28, 2680(14) and U.S.C.A. 28, 2680(57). Such infringements of Defendant's constitutional rights committed by the trial court were encouraged or admitted by the Iowa Court of Appeals and the Supreme Court of Iowa.

Two more technical experts hired by De-

fendant after trial did totally agree with the experts' testimonies presented during trial.

Relocation of ditch on Defendant's property was subject to a court claim filed by Defendant against the City of Davenport and the Court ruled against the City of Davenport for damages produced to Defendant's property. (See Appendix F)

The immediate neighbor, Shirley DePardo, east of Defendant's property, did file a claim against Defendant for the same reason as Plaintiffs, but her claim has been denied by the Scott County Court. (See Appendix E)

Plaintiffs, through their claim, did consider as the best opportunity to pretend claims in an abusive way, including in expenses: CB equipment, TV-stereo, table and chairs, frozen food, carpets, stairway, hunting clothing. Repairing of basement did cost $3,192 and they pretended $14,326.

A 30-year-old house shell, at a $600 cost, moved in 1973 over an improper foundation, became completely remodeled house after the damage of basement. Neighbors' houses, being at lower elevation, exposed more to flooding, did not have any damages at their basements. This demonstrates once more the weakness of Plaintiffs' house, not properly built to withstand hydrostatic pressure created by infiltrated water.

The Court should have found that the Plaintiffs have failed to carry their burden of proof and the Court should have ruled in the Defendant's favor on the question of responsibility for damages done to the Plaintiffs' residence. The Defendant's frustration now is by far greater when Supreme Court of Iowa did affirm the lower court's judgment. The Defendant, who has a degree in engineering, who explained so clearly his innocence, being very familiar with such problems, will remain deceived for

the rest of life about the justice system if the Supreme Court of United States would not grant a writ of certiorari.

The City of Davenport should have been corrected flooding problem in Green Acres area long before, in spite of opposition from some property owners, but even now there is no intention to do it.

> "It is not province of courts to draw on their own views as the morality, legitimacy and usefulness of particular business in order to decide whether statute bears too heavily upon the business and by doing so violates due process." Joseph E. Seagram & Sons, Inc. v Hostettler, N.Y. 1966, 86 S.Ct. 1254.

> "Burden of proof may amount to a federal question when intimately involving substantial rights under a federal statute." Hill v Smith, Mass. 1923, 43 S. Ct. 219, U.S. 592, 67 L.Ed. 419.

The Court refused to admit substantial evidence presented by Defendant and declined to make responsible for such flood the City of Davenport, which did not take any action to prevent such natural disaster. The Court in exchange attributed all pretended damages to Defendant, who did not and does not have

any guilt and power to control a natural disaster. The foregoing makes it clear that the issues raised are significant and are valid reasons for granting a writ of certiorari.

The decision below conflicts with the decisions of other courts and to the proper interpretation of 28 U.S.C.A. 1254(27), (65), (66), (73), (192), (206), and 2680 (14) and (57).

The Defendant filed a Motion for New Trial alleging the following grounds: the court's findings on liability and damages were not supported by sufficient evidence; new evidence had been discovered which could not have been discovered or produced at trial; the Defendant's counterclaim and his demand for jury trial were incorrectly overruled by the court and affirmed by superior courts.

The Iowa law concerning motions for new trial is that the District Court has broad

discretion in ruling upon a motion for new trial. The District Court's ruling on a motion for new trial will be reversed on appeal only if it appears that the discretion of the District Court has been abused. Fleener v Board of Supervisors of Poweshiek County, 246 N.W.2d 335 (Iowa 1976)

The Iowa rule concerning motions for new trial based upon new evidence is that new evidence, to justify a motion for new trial, must involve evidence discovered following the trial that couldn't have been discovered before the conclusion of trial with the use of due diligence by the parties. Further, the new evidence must be material to an issue at trial and not be merely impeaching or cumulative in nature. The new evidence should allow some reasonable probability that the outcome of the trial would have been changed had that new evidence been available. Yoder v Iowa Power & Light Company, 215 N.W.2d 328 (Iowa 1974).

As new evidence, the Defendant offered the testimony of Professor Subhash C. Jain, who is a professor of civil and environmental engineering at the University of Iowa. The Defendant also wished to offer the expert testimony of Mr. Robert Myer of Beling Consultants of Moline, Illinois, and the testimony of Mr. Barry Gill, Mr. Willford Hammes, and Pat McGrath.

The evidence which the Defendant did provide the court was clearly material to the basic issues at trial. The problem with the Defendant's Motion for New Trial concerns the question of whether or not this new evidence could have greatly benefited from expert opinion. Motion for New Trial could have convinced more the Court when two more experts would have enforced identical opinions of experts presented already during trial:

Beling Consultants' Report: Only surface water provided by flood could not de-

termine a basement collapse; improper construction and backfill made by Plaintiffs did contribute to the collapse of basement; lack of flood prone structural considerations during construction; the position of channel at present location or that one after the fill was made on Lot 32W in May, 1977, does not have any influence on flooding Green Acres area; such flood could be controlled only through collective effort with the City of Davenport by creating a proper water drainage.

Dr. Subhash C. Jain's Report: Factors responsible for the collapse of Plaintiffs' house were lack of flood control system in that area; flooding was not influenced by the channel on Defendant's property; the old and new position of channel on Defendant's property could not influence flooding in that area; reasons of basement collapse were water infiltration, lack of drainage of water from the house (tiles and sump

pump); the only flow of water in that area is possible from northwest to southeast and then backup and reach McCallister, DePardo and the last the Plaintiffs' house.

Although it is always somewhat speculative to estimate the impact of evidence that was not presented at trial, surely the testimony of persons such as a professor at the University of Iowa would, at the very least, have been cause for the court to very carefully weigh the question of causation of damages. It is not a difficult stretch of the imagination to foresee a different outcome in the judgment of the court had the Defendant provided the court with the sort of testimony that forms the basis of his Motion for New Trial. Under these circumstances, the court abused its discretion in refusing to grant the Defendant a new trial. (See Appendix C)

The Defendant, being forced to appear at the trial without counsel, was more inter-

ested in demonstrating technical impossibility of Plaintiffs' claim, neglecting in some occasions legal technicalities.

> "Claim of lack of assistance of trial counsel presented important constitutional question warranting the granting of certiorari." Carnley v Cochran, Fla. 1962, 82 S.Ct. 884, 369 U.S. 506, S.Ct. L.Ed.2d 70.

During trial and after trial, the Defendant has been deprived of the constitutional rights secured by U.S.C.A. 28, 1254(65); 28, 1254(66) and 28, 1254(206) because there was not considered or accepted opinions of technical experts and were considered only depositions of Plaintiffs' witnesses which were very questionable and without a technical base.

Court did not get additional opinions from technical experts designated by the court in order to avoid severe errors, having no technical support, leading to an unfair judgment.

> "Certiorari by Supreme Court was granted to consider claim that circumstances attending state trial were such to deprive defendant of rights secured to him by U.S.C.A. Constitutional Amendment 14." Turner v State of La. 1965, 85 S.Ct. 546, 379 U.S. 466, 13 L.Ed.2d 424.

> judgment of the state courts continues to be an essential factor for the purpose of the remedy by certiorari." Bruce v Tobin, S.D. 1917, 38 S.Ct. 7, 245 U.S. 18, 62 L.Ed. 123.

The state courts were not enough fair in clarifying such clear technical case in consulting more technical experts. Similar flood will take place in same conditions of rainfall and state courts decision will remain as a dark spot in the Iowa legal system. Further analysis and experience of case should have been done to avoid such mistake.

> "It will require a very clear case to warrant the reversal of the decree of a state court which though final in form merely postpones a decision upon the merits for further experience." Cedar Rapids Gas Light Co. v Cedar Rapids, Iowa, 1912, 32 S.Ct. 389, 223 U.S. 665, 56 L.Ed. 594.

Flooding in Green Acres area will take place any time in the future if similar rainfalls would take place.

In the Defendant's opinion, enough evidence has been presented during trial but determined to be immaterial or not considered at all. In such situation, one of the

Supreme Court's rulings was as follows:

> "Where evidence stricken was determined to be immaterial by State Supreme Court, Supreme Court could treat the case as though evidence had been received and held without bearing." Hans Rees Sons, Inc. v State, N.C. 1931, 51 S.Ct. 385, 283 U.S. 123, 75 L.Ed. 879.

When such evident injustice has been committed by the State Courts to Defendant, condemning him to pay for the natural damages out of his control, the Supreme Court has the power to bring up such case on certiorari.

> "Power of determining what cases should be brought up on certiorari is vested to the Supreme Court." Warren v Orleans, 1897, 17 S.Ct. 892, 176 U.S. 474, 42 L.Ed. 239.

> "Certiorari is a discretion writ." Hyde v Shine, Cal. 1905, 25 S.Ct. 760, 199 U.S. 62, 50 L.Ed. 90.

The Defendant believes also that his petition for writ of certiorari could be considered on the merit also because it has been committed an erroneous judgment by the trial court, affirmed by the Iowa Supreme Court, which could have been avoided if

jury trial would have been admitted. (U.S. C.A. 28, 1254(192). Defendant is obliged to pay for a damage created by a flood, a natural disaster, helped by an improper construction of Plaintiffs' basement in an area well known before for flooding occurrences.

> "Upon certiorari to review a decision of the circuit court of appeals dismissing a writ of error for want of jurisdiction which decision was erroneous, the Supreme Court proceeded to determine the case upon the merits." Mutual Life Insurance Co. v Phinney, Wash. 1900, 20 S.Ct. 906, 178 U.S. 327, 44 L.Ed. 1088.

The courts did invoke all types of legal technicalities but failed to document the basic character of the right in dispute in refusing to consider technical opinion of experts. All technical experts in their opinion did contradict the state court's rulings and on top did oblige the Defendant to pay for undocumented damages. The state courts, without help of technical experts, were not qualified to establish who is right or wrong in a technical matter.

> "The right of review is not made to depend on the money value of the thing in controversy but on the character of the right in dispute and the judgment which the state court has pronounced on it." Buel v VanNess, Vt. 1823, 21 U.S. 312, 8 Wheat. 312, 5 L.Ed. 624; Weston v City Council of Charleston, S.C. 1829, 27 U.S. 449, 2 Pet. 449, 7 L.Ed. 481.

Rehearing of case could also be another option for the Supreme Court to decide on under U.S.C.A. 28, 1254(73). Through rehearing the Defendant would have the chance to demonstrate that an error in judgment has been committed during trial.

FEDERAL PRE-EMPTION IS JURISDICTIONAL

Pre-emption by the federal government, quite simply, deprives state courts of subject matter jurisdiction and this has been so from the earliest days of our country. In McCulloch v Maryland (1819) 4 Wheat. 316, Chief Justice Marshall construed the Supremacy Clause as the bulwark of national power it has since remained, when he declared:

> "The states have no power by taxation or otherwise, to retard, impede, burden, or in any manner control the operation

> of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government." 4 Wheat. at 463.

Chief Justice Marshall again articulated the meaning of the Supremacy Clause in Gibbons v Ogden (1824) 9 Wheat. 1, 6 L.Ed. 23, when he stated:

> "The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law." 9 Wheat. at 210, 211.

Ever since McCulloch and Gibbons, if a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim to validity - and this is true even though the state action in question was taken within a sphere in which the states could otherwise act. Free v Bland (1962) 369 U.S. 663, 666, 8 L.Ed.2d 180, 82 S.Ct. 1089; Franklin Nat. Bank v New York (1954) 347 U.S. 373, 379, 98 L.Ed. 767, 774, 74 S.Ct. 550; Wissner v Wissner (1950) 338 U.S. 655, 94 L.Ed. 424, 7 S.Ct. 398.

This Court continually uses the phrase "nullity" when it speaks of state acts in contravention of federal pre-emption. In New Mexico v Mescalero Apache Tribe (1983) _____ U.S. _____, 76 L.Ed.2d 611, 103 S.Ct. _____, the court dealt with a collision between New Mexico hunting and fishing regulations and Indian tribal regulations on the same subject. In holding that the state laws had been pre-empted, the court held that federal pre-emption means a state is without jurisdiction to act in the pre-empted area.

That this Court intends the doctrine of pre-emption to nullify state action is further demonstrated by Ridgway v Ridgway (1981) 454 U.S. 46, 101 S.Ct. 49, 70 L.Ed. 2d 39, wherein the court swept away an earlier injunction by a state court that required a service member to retain a serviceman's group life insurance policy in effect on his life for the benefit of his three child-

ren. The Ridgway court quoted from United States v Yazell (1966) 383 U.S. 341, 352, when it held:

> "The relative importance to the state of its own law is not material when there is a conflict with a valid federal law, where the Framers of our Constitution provided that the federal law must prevail."

CONCLUSION

Because the Defendant was denied a jury trial, this cause should be remanded for new trial.

Because the Defendant was denied the opportunity to present his counterclaim, this cause should be remanded for new trial, or the Defendant should be granted permission to pursue his counterclaim as a separate lawsuit.

Because there was insufficient evidence in the record to support the findings of the District Court concerning liability, the judgment entered should be reversed and judgment should be entered for Defendant.

For these reasons, a writ of certiorari

should issue to the judgment and opinion of the Iowa Supreme Court.

Dated: April 27th, 1984.

Respectfully submitted,

John Burche
5210 Division Street
Davenport, Iowa 52806

Petitioner Pro Se

APPENDICES

IN THE SUPREME COURT OF IOWA

JOHN S. WALTERS and VIRGINIA L. WALTERS, Appellees, vs JOHN BURCHE a/k/a IOAN A. BURCHE, Appellant.	)	Case No. 2-69402
	)	ORDER

Defendant-Appellant's application for further review is hereby overruled and denied after consideration by this court en banc.

Dated this 24th day of February, 1984.

THE SUPREME COURT OF IOWA

By _____
W. W. Reynoldson,
Chief Justice

Copies to:
Seymour Raben - Attorney Plaintiffs
200 Union Arcade Bldg.
Davenport Iowa 52801

Patrick J. Kelly - Attorney Defendant
609 Kahl Bldg. Davenport Iowa 52801

IN THE COURT OF APPEALS OF IOWA

JOHN S. WALTERS and VIRGINIA L. WALTERS, Plaintiffs-Appellees, vs JOHN BURCHE a/k/a IOAN A. BURCHE, Defendant-Appellant.	)	Case No. 3-336 2-69402
	)	Filed December 27, 1983

Appeal from Scott District Court - J. Hobart Darbyshire, Judge.

Defendant appeals from a judgment for plaintiffs in a tort action. AFFIRMED.

Considered by Snell, P.J., and Schlegel and Hayden, J.J.

HAYDEN, J.

Defendant appeals from a judgment for plaintiffs in a tort action. We affirm.

Plaintiffs filed suit on October 25, 1979, seeking damages for the collapse of the foundation of their home allegedly caused by the defendant's diversion of water from his lot onto plaintiffs' property. Defendant's answer was filed December 10, 1979. In April of 1982, defendant dismissed his attorney and proceeded to represent himself. On April 27, he filed a counterclaim alleging that plaintiffs' suit was groundless and was filed to harass defendant. On April 29, defendant filed a demand for a jury trial. The case had since February been scheduled for trial on May 13. The court dismissed the counterclaim and denied the jury trial request on the grounds that they were untimely filed. In a trial to the court plaintiffs were awarded a judgment of

$14,326.

On appeal defendant asserts: (1) the trial court erred in dismissing his counterclaim; (2) the trial court erred in denying his request for a jury trial; (3) there was insufficient evidence to support a verdict for the plaintiffs; (4) the damages awarded are excessive; and (5) the trial court erred in denying defendant's motion for a new trial on all the grounds listed above and also on the ground that defendant had newly-discovered evidence.

Our review of this action at law is on assigned error. Iowa R. App. P. 4.

I.

The Counterclaim. Defendant argues that the trial court should have allowed him to amend his answer to seek damages from the plaintiffs for harassment. Iowa Rule of Civil Procedure 88 dealing with amendments to pleadings provides:

> A party may amend a pleading once as a matter of course at any time before a

> responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it any time within twenty days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Ordinarily courts have great discretion in allowing amendments. Ackerman v Lauver, 242 N.W.2d 342, 345 (Iowa 1976). Allowance of an amendment is the rule and denial is the exception. Galbraith v George, 217 N.W.2d 598, 601 (Iowa 1974). The question in this case is whether justice required the trial court to allow defendant to assert his counterclaim.

We find no abuse of discretion in the trial court's denial of the amendment. The request came approximately 2-1/2 years after defendant's answer was filed and shortly prior to the date when the case was set for trial. The amendment would

have injected new issues into the case on the eve of trial. While the parties were prepared to address the question of whether the damages to plaintiffs' property were caused by the water diverted by the defendant, plaintiffs were not prepared to defend their motivation and intent in filing the lawsuit. The language of Rule 88 was amended to eliminate the prohibition against allowing an amendment which would change the issues in the case. Nevertheless, we believe this is a factor to consider in determining whether justice requires the court to allow the amendment. Plaintiffs may well have required a continuance to defend themselves against a new accusation of malicious prosecution or abuse of process. This addition of issues to the case at such a late point after a substantial delay is sufficient to justify the trial court's refusal to allow the defendant to amend his answer.

II.

Demand for a Jury Trial. Belated requests for jury trials are covered by Iowa Rule of Civil Procedure 177(d). The granting or denial of the request under this rule rests with the discretion of the trial court. It has been held that denial of the request is not an abuse of discretion where the request is several months late and the case has already been assigned for trial as a nonjury case. Egan v Egan, 212 N.W.2d 461, 464 (Iowa 1973); Schupbach v Schuknecht, 204 N.W.2d 918, 920 (Iowa 1973). We hold the trial court did not abuse its discretion in denying defendant's belated request for a jury trial.

III.

Sufficiency of the Evidence. The findings of fact by the trial court have the effect of a special verdict and are equivalent to a jury verdict. An appellate

court will not disturb them if they are supported by substantial evidence. We construe the evidence in the light most favorable to the judgment, whether contradicted or not, and we do not weigh the evidence or pass on the credibility of witnesses. Carson v Mulnix, 263 N.W.2d 701, 705 (Iowa 1978).

There was ample evidence in this case to support the findings. A city engineer testified that defendant's landscaping diverted the natural drainage of water. He also opined that the extra water on plaintiffs' property caused the damage to their house. Another witness testified that he saw water running to plaintiffs' home from defendant's ditch on the night the damage occurred. One of the plaintiffs testified that he had not had any water problem before defendant dug the ditch nor had there been a problem since the city relocated the ditch. The court

was justified in concluding from this and other competent evidence that defendant is liable for the damage.

IV.

Damages. Defendant claims that even if he is liable, the damages allowed by the court are excessive. The principle underlying allowance of damages is to place the injured party in the same position he would have been in if no injury had occurred. Schiltz v Cullen-Schiltz & Associates, Inc., 228 N.W.2d 10, 20 (Iowa 1975). Defendant claims that the damages in this case exceed the actual value of the improvement immediately prior to the injury. However, where the injury is such that the premises may be restored to as good a condition as before, the measure of recovery is the fair and reasonable expense of restoration. Id. at 21. The court's judgment follows closely the damages proven by plaintiffs as the cost

of restoring their home and is not excessive.

V.

Motion for a New Trial. Since we find the prior assertions of error made by the defendant to be without merit, we cannot say the trial court erred in denying defendant a new trial on those grounds. In addition, defendant argues that he should have been given a new trial to allow him to present some newly-discovered expert testimony on the issue of causation. In order to prevail on this ground defendant must show among other things that the evidence was discovered after the trial and could not have been discovered before the conclusion of trial in the exercise of diligence. Yoder v Iowa Power and Light Co., 215 N.W.2d 328, 335 (Iowa 1974). Defendant admits, however, that the expert testimony could have been discovered before the conclusion of the trial.

The court did not err in denying the motion for a new trial.

In several of defendant's arguments, he has maintained that established rules of law should be set aside in this case because defendant, a layman, was not aware of the rules. Defendant dismissed his counsel and chose to represent himself. The court did not err in refusing to give him advantages denied to other litigants. We refuse to hold that judicial time should be wasted in a new trial because defendant was unaware at the time of trial that expert testimony would be beneficial to his case.

AFFIRMED.

IN THE IOWA DISTRICT COURT FOR SCOTT COUNTY

JOHN S. WALTERS and VIRGINIA L. WALTERS, Plaintiffs,	)	LAW NO. 62011
vs	)	RULING ON MOTION FOR NEW TRIAL
JOHN BURCHE a/k/a IOAN A. BURCHE, Defendant.	)	FILED October 20 1982 David H. Dahlin Clerk District Court Scott County Iowa

Defendant's motion for new trial came on for hearing before the court on October 15, 1982, plaintiffs appearing by their attorney, Seymore Raben, and defendant appearing by his attorney, Patrick Kelly. Counsel for defendant having had a full opportunity to argue the motion for new trial and counsel for plaintiff arguing in resistance thereto, and the court being fully advised to the premises finds that the defendant has failed to show any error of law or mistake of fact which would entitle defendant to a new trial, nor is the proffered "newly discovered

evidence" evidence which could not, with reasonable diligence, have been discovered and produced at trial.

It is therefore Ordered that defendant's motion for a new trial be and the same is hereby denied.

Dated this 19th day of October, 1982.

/s/ J. Hobart Darbyshire

J. Hobart Darbyshire
Judge

IN THE DISTRICT COURT OF IOWA FOR SCOTT COUNTY

JOHN S. WALTERS and VIRGINIA L. WALTERS, Plaintiffs, vs JOHN BURCHE a/k/a IOAN A. BURCHE, Defendant.	LAW NO. 62011 FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT ENTRY

FILED
August 16 1982
David H. Dahlin
Clerk District Court

Plaintiffs commenced the present lawsuit to recover for damages done when a large amount of surface water collapsed the basement wall of their residence. Plaintiffs claim that a nearby landowner, Defendant, changed the natural flow of surface waters by regrading his lot and in so doing caused Plaintiffs' damage.

By way of foundational facts, Plaintiffs are, and have been since 1973, owners of a city lot upon which their personal residence is situated. Defendant became owner of a city lot located, for ease of reference, three city lots

west of the lot owned by the Plaintiffs. The owners of the two lots between Plaintiffs' and Defendant's lot are individuals named Depardo, who own the lot immediately east of the Defendant's lot, and McCallister, who own the lot between Depardo and the Plaintiffs. Prior to Defendants' purchase of their lot, natural drainage of surface water flowed from northwest of Defendants' property, across approximately the rear-most half of Defendants' lot in a southeasterly direction, crossing the Depardo lot and flowing between the Depardo house and the McCallister, emptying into a culvert located in front of the McCallister house. The culvert passes under 49th Street, which street runs in a generally east-west direction in front of all of the properties mentioned. There is little dispute that the property to the west of the Defendants' lot was low and swampy and that the rear of Defendants'

lot was, at the time they purchased it, similarly low and swampy. The natural contours of the land provided a depression running approximately northwest to southeast from Defendants' lot to the culvert in front of the McCallister property. It is further virtually undisputed that the natural flow of surface drainage water prior to 1976 flowed in this manner, and Plaintiffs had never, prior to the time the present damage occurred, experienced any flow of water across their lot from the above-described natural drainage course. Plaintiffs' property, as disclosed by exhibits, being at a slightly higher elevation than the low lying swampy area to the rear of Defendants' lot and the natural depression which carried the surface waters toward the street culverts.

Defendants desired to improve their lot so that they could build a duplex on it. To do so, it was necessary to regrade the

lot which was hilly toward the front of the lot facing the street. They caused the hill to be graded off and used the resulting dirt to fill in the swampy area to the rear of their lot. They also put in a ditch across the rear of the lot from west to east to take care of the "ponding" of water on the property immediately to their west. In the early morning hours of August 20, 1979, the area experienced a heavy rainstorm. As a result of large amounts of surface water flowing on to the Plaintiffs' lot, the west basement wall of their house collapsed, resulting in considerable damage to the residence and Plaintiffs' personal property. Defendants dispute that the changes they made in the grade of their lot caused the damage to Plaintiffs' house, rather, Defendants claim that the damage was due to the fact the culverts under 49th Street are inadequate to handle large rainfalls and that

water "backed up" from the culvert on to Plaintiffs' lot causing an accumulation of water which collapsed the basement wall.

A certain amount of review of the testimony is necessary. Michael McCallister, called as a witness by Plaintiff, testified that he lives in the house located between Depardo's and Plaintiff Walters'. On the night of August 20, 1979, during the rainstorm, they discovered that their basement was flooding. It had never flooded before. He stood on the back porch of his house and observed water running from west to east behind his house, with what he described as great velocity towards the Plaintiff Walters' house. From what he observed, it was coming from north and west of his house in the proximity of Defendants' ditch and he observed that the water had considerable speed to it. After the waters receded, the next day,

it was easy to tell where the water had come from -- in nearly a straight line from Defendants' ditch. Prior to that evening, neither his own yard, nor the Plaintiffs' yard, had ever been flooded. Rather, when the volume of surface water in the natural depression became too great for the culverts underneath the street, the water would run over the street. From his observation, Defendant raised the grade on the back of his lot some six to eight feet, creating a reservoir to the west of his lot. Prior to Defendant raising the grade, there was a gradual runoff across the back of that lot, and surface water "flattened out" across Depardo's lot, going between Depardo's lot and McCallister's. On the evening of the large rainfall, August 20, 1979, Plaintiffs attempted to make their way to McCallister's house during the time the water was flowing across the back of

McCallister's lot toward Plaintiffs' house and after it had collapsed Plaintiffs' basement wall. McCallister watched Plaintiff Walters attempting to walk across the swiftly moving water and he had difficulty because of the velocity of the water. The water, from McCallister's observation, flowed swiftly across the back of his own lot, hit the Plaintiffs' house, and turned back towards McCallister's house. The ditch constructed by Defendants across the rear of their lot, when they increased the grade, more or less "aimed" toward the Plaintiffs' house. After this occurrence, the City of Davenport dug a new ditch across the rear of Defendants' lot at an angle, from the northwest to the southeast, which corresponded more closely to the original depression water course. Since the new ditch has been constructed, neither McCallister nor Plaintiffs have experienced any flooding of their properties.

Plaintiff, John S. Walters, testified similarly to Plaintiffs' witness, McCallister. He testified that on the night of August 20, 1979, they were awakened because the whole house started to shake. They got out of the house and observed the fast flowing water, and the damage done to their foundation. The next day, he followed the course of the water to the ditch dug by Defendants. It was easily observable because of bent grass and debris in almost a straight line from Defendants' ditch to his house. Ivan Hayes, a landscaper, called as a witness by the Plaintiffs, testified that he was the individual hired by Defendant to put a finish grade on Defendants' lot for him. From his observations, a rough grader had graded down the front of the lot and put the dirt on the rear of the lot. From the middle of the lot towards the rear, he had raised the grade approximately seven

to eight feet. There was an observable drainage ditch before raising the lot, the main channel of which drainage ditch was as previously described, which carried the normal surface flow of water. After the grade was raised, there was a great difference in where the water collected. The ditch dug by Defendants was approximately 70 feet north, towards the back of Defendants' lot, from the natural channel, and the raised grade created a reservoir area. Raising the grade definitely changed the direction of the natural flow of water. From his observation, where the Defendants had cut the new ditch across the rear of their lot, it pointed the direction of flow of water towards the Plaintiffs' house, which was approximately 160 to 170 feet away.

Mr. Rex Matthews, from the Construction Engineering Department for the City of Davenport, testified as to his familiarity

with the area both before and after Defendants raised the grade on their lot. In his estimate, Defendant had built up the rear of the lot approximately five feet. He described the condition previous as a "natural draw". By raising the grade, Defendant partially blocked the natural flow of water and diverted it further north across his own lot. The ditch constructed by Defendant restricted the flow of water through a more narrow channel. Water passing through a smaller channel has a greater velocity. He observed the damage to the Plaintiffs' house the day following the storm, and observed the path of the water as coming from the ditch Defendant constructed. Without the ditch constructed by the Defendant, the natural flow of the water would have been across Depardo's lot and to the culvert on 49th Street. In his professional opinion, Defendant diverted the natural and regular

flow of the water by raising the level of his lot, blocking the flow and diverting it further to the north through a smaller ditch. In his opinion, this was the cause of the damage to Plaintiffs' home. The City cut a new ditch across the rear of Defendants' lot to return the flow of water to its previous course, and there have been no reported problems since August of 1980. On cross-examination, Mr. Matthews testified that he agreed with the opinion of Defendants' expert, Major Engineering, that the culverts under 49th Street are not large enough to handle extremely large volumes of water, however, when the water reached the level of the street, it simply passed over the top of the street. In addition, in order to put in oversized culverts under the street, it would be necessary to raise the whole grade of the street at that point, which is not a desirable design feature.

Defendant John Burche testified that he was himself an engineer, and testified that he did level the lot and increased the grade to the rear of their lot, and cut a ditch to carry the flow of water from the west side of his lot to the east. It was his opinion, however, that the ditch did not cause Plaintiffs' damage, rather, it was due to the inadequate size of the city culvert underneath 49th Street, and water backing up on to Plaintiffs' lot, rather than water flowing from his ditch and striking Plaintiffs' foundation. Defendant's wife, Maura Burche, testified that she too was a chemical engineer, that in her opinion, the ditch they constructed across the rear of their lot was not the cause of Plaintiffs' damage, but rather the inadequate culvert under the street.

Andrew Liska, a civil engineer employed by Major Engineering Company, testified in his opinion, based on the elevation of the

land, it would have been difficult for the water coming through the channel on Defendants' lot to reach Plaintiffs' house and do the damage reported to have been done. He was of the opinion that if the wall collapsed, it was possibly due to hydrostatic water pressure.

Plaintiffs' offered, by way of evidence, testimony and exhibits disclosing the cost to repair the foundation of the house, repair cracked and damaged plaster in the house itself, furniture refinishing, replacement of basement carpet and tile, plumbing, landscaping and back filling, totalling $10,657. They estimated that they themselves worked in excess of 100 hours in cleaning, repairing and rebuilding, for the sum of $1,300, and listed damaged and destroyed personal property valued at $2,375. In total, Plaintiff offered evidence disclosing that they had been damaged, as a result of the incident,

in the sum of $14,326.

The Court has reviewed all of the testimony and exhibits offered by the parties, and finds, by a clear preponderance of the evidence, that the Defendants by raising the grade of their lot interrupted the previously existing natural drainage course, and that by constructing a narrow ditch some 70 feet further towards the rear of their lot from the natural drainage course, they diverted the flow of natural surface waters causing it to run towards the Plaintiffs' property when it had never done so before. The Court further finds that in so doing, they caused a condition which resulted in casting substantially greater water upon the Plaintiffs' property than had previously ever existed, proximately resulting in the damage described to Plaintiffs' property.

The law with regard to this case is clear and well established in Iowa. The

disposition of ordinary surface waters is determined by the relative elevations of adjacent tracts. Downey v Phelps, 201 Iowa 826, 208 N.W. 499.

It has long been the law in this state, as stated in the case of Rosendahl Levy v Iowa State Highway Commission, Iowa, 1969, at Page 536:

> "The general rule is that the dominant owner is entitled to drain surface water in a natural water course from his land over the servient owner's land and if any damage results the servient owner is without remedy. This rule, however, is subject to qualification. We have many times held that if the volume of water is substantially increased or if the manner or method of drainage is substantially changed and actual damage results, the servient owner is entitled to relief."

As recognized by the Iowa Supreme Court in the case of Board of Supervisors of Pottawattamie County v Board of Supervisors of Harrison County, 214 Iowa 655, 672, 241 N.W. 14, 20, as follows:

> "Therefore, it seems that the rule under the statute now is that the upper proprietor may drain his land through natural water courses in a way to in-

> crease the water that is to flow over the servient land, providing the increase is not too great or in such unnatural quantities as to cause substantial injury. ...It is important here to note that there is a limit to the manner and quantity in which water may be drained by the individual landowner from the dominant to the servient land. In addition to the foregoing, it is to be recognized that although to a certain extent a dominant landowner may increase the flow of the drainage water which falls to the servient land, yet he can not drain such water in a different manner than the same would naturally and ordinarily have gone in the regular course of drainage, and thereby do substantial damage to the servient estate. ...Consequently, it appears that the individual landowner draining water on his own land can not usually increase the volume thereof on to the servient land, nor can he drain such water in an unusually or materially different way than the same naturally would run."

More recent confirmations of the common law principles appear in Ditch v Hess, Iowa, 1973, 212 N.W.2d 442, Page 448, and Braverman v Eicher, Iowa, 1976, 238 N.W.2d 331, Page 334. There is further a statutory provision dealing with the matter of altering natural drainage. Section 465.22 provides, in part, as follows:

"Owners of land may drain the same in the general course of natural drainage by constructing or reconstructing open or covered drains, discharging the same in any natural water course or depression whereby hte water will be carried into some other natural water course, and when such drain is wholly upon the owner's land he shall not be liable in damage therefore, nor shall any such owner in constructing a replacement drain, wholly on his own land, and in the exercise of due care be liable in damages to another in case a previously constructed drain on his own land is rendered inoperative or less sufficient by such new drain, unless in violation of the terms of a written contract."

In substance, the statutory provision provides, as it relates to the present case, that the Defendant may reconstruct the natural drainage on his own land provided the drainage is in the same general course of natural drainage, and provided the discharge follows the natural water course. Many, many cases have been decided by the Iowa Supreme Court under this code section and the rule has remained substantially unaltered for a great length of time.

In conformity with the above rules of law, and the findings of fact previously

made, the Plaintiffs having proven their cause of action by the requisite burden of proof by a preponderance, it is therefore Ordered, Adjudged and Decreed by the Court that Plaintiffs have and recover from and against the Defendants, John Burche, a/k/a Ioan A. Burche, the sum of $14,326, with interest thereon as provided by law, and the costs of this action as taxed by the Clerk.

Dated in Davenport this 16th day of August, 1982.

/s/ J. Hobart Darbyshire

J. Hobart Darbyshire
Judge

IN THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY

MRS. SHIRLEY DePARDO, Plaintiff, vs JOHN BURCHE, Defendant.	SC NO. 20022-1079 ORIGINAL NOTICE (ACTION FOR MONEY JUDGMENT) FILED 10-12-79

To The Above-Named Defendant:

You are hereby notified that the Plaintiff demands from you the amount of $1,000.00 based on the flooding and damage to the Plaintiff's real estate and personal belongings due to the Defendant's alteration of the course of a natural water flow contrary to I.C.A. 652.2(3).

Unless you appear by completing and filing the attached appearance and answer form with the clerk of the court at Davenport, Iowa, Scott County, on or before the 7th day of December, 1979, judgment shall be rendered against you upon Plaintiff's claim together with interest and court

costs.

If you deny the claim and appear by filing the attached appearance and answer on or before the date specified, you will then receive notification from the clerk's office of the place and time assigned for hearing.

Shirley DePardo
By:
Marc R. Engelmann
18D Lincoln Ave.
Park View
Eldridge, Iowa 52748

JUDGMENT ENTRY:

1/9/80: Judgment for Plaintiff denied. Motion for judgment granted for Defendant.

G. Goebel, Judge

IN THE IOWA DISTRICT COURT FOR SCOTT COUNTY

JOHN BURCHE, Plaintiff, vs CITY OF DAVENPORT, Defendant.	) LAW NO. 63480) FINDINGS OF FACT,) CONCLUSIONS OF LAW) and JUDGMENT ENTRY) FILED) Apr.20 1982) David H. Dahlin Clerk) District Court Iowa

This is a negligence action for damages by a city real property owner against his municipality heard to the Court on April 19, 1982.

The Court FINDS that on or about July 18, 1980, city employees drove a Drott Grade-All wheeled four-yard backhoe piece of heavy equipment over the length of Plaintiff's concrete driveway causing cracking damage thereto. The Court further FINDS that the cost to repair the driveway damages caused by the Defendant is the sum of $1,650.

The Court CONCLUDES that Defendant had a duty of reasonable care to Plaintiff to not damage his driveway; and if Defendant

breached that duty of care, Defendant is negligent; and if that breach was the proximate cause of damages to Defendant's property, the Defendant is liable to Plaintiff for the reasonable cost to repair the damages.

The Court FINDS and CONCLUDES, therefore, that the Defendant was negligent, proximately caused damages to Plaintiff's driveway, and is liable to him in the amount of $1,650.

The Court further FINDS and CONCLUDES that all other claims of the parties not consistent with these findings and conclusions should be denied.

It is therefore ORDERED, ADJUDGED and DECREED that Judgment is entered for the Plaintiff and against the Defendant for the sum of $1,650 with interest thereon at the legal rate of 10 percent per annum from August 29, 1980, until paid in full. All court costs are taxed to the Defendant

computed by the Clerk to be the sum of $37.00.

Dated this 20th day of April, 1982, Davenport, Iowa.

C. H. Pelton
District Judge